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Craig W. Barnett

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1 RECORD OF ORAL HEARING

2 UNITED STATES PATENT AND TRADEMARK OFFICE

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5
6 BEFORE THE BOARD OF PATENT APPEALS
7 AND INTERFERENCES

8
9
10 *Ex parte* CRAIG W. BARNETT, KAREN R. REISNER and
11 MARK BRAUNSTEIN

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14
15 Appeal 2007-0794
16 Application 09/879,825
17 Technology Center 3600

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20 Oral Hearing Held: Wednesday, February 20, 2008

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24 Before RICHARD TORCZON, SALLY MEDLEY and JAMES T. MOORE,
25 *Administrative Patent Judges..*

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27
28
29 ON BEHALF OF THE APPELLANTS:

30
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1 The above-entitled matter came on for hearing on Wednesday,
2 February 20, 2008, commencing at 9:00 a.m., at the U.S. Patent and
3 Trademark Office, 600 Dulany Street, Alexandria, Virginia.

4
5 P R O C E E D I N G S
6

7 JUDGE MOORE: Okay, welcome Mr. Gatto. We are here for
8 the oral argument in appeal number 2007-0794 in reference to serial number
9 09/879,825, the application of Craig W. Barnett, et al. Mr. Gatto, you have
10 20 minutes to spend as you will.

11 MR. GATTO: Thank you very much. I probably will not use
12 all of that, but I will -- what I would like to do is really address a couple of
13 the key issues I think that are in the briefs. There are a lot of legal issues
14 there. We think the examiners made a lot of legal errors.

15 But I think that there is a few that are somewhat dispositive
16 here, and I would like to focus on those. By way of preliminary comment, I
17 think a couple of things are important to note. One is I think it is important
18 to remember this application has a filing date, effective filing date of April
19 of 1995.

20 And I think in a lot of cases the examiner has applied hindsight
21 as far as what's known now with respect to the Internet in making some of
22 his rejections. And I think that is you know one thing to keep in mind, is
23 that we have to look at the invention at the time the application was filed.

1 The second thing is that many of the claims here were copied
2 from the Lauer patent, and I think it is important to note for purpose of
3 provoking interference. So many of these claims were already examined and
4 issued by the patent office. These claims were copied.

5 And to the extent that there are some claim interpretation issues,
6 which we will get into in a second, under the Vas-Cath and other cases it is
7 important that we look at the specification from which the claims were
8 copied to the extent that is necessary. And the examiner hasn't done that.

9 The other thing I think that is important to keep in mind is that
10 with respect to the invention, what we are -- really there is many different
11 independent claims here, but I think there are some common themes
12 throughout them that I will kind of first give a very brief overview just to
13 make sure we are all oriented on the same page.

14 JUDGE TORCZON: Okay, I would like to address one of your
15 premises though.

16 MR. GATTO: Yes?

17 JUDGE TORCZON: You said that we should take into
18 consideration the specification the claims were copied from.

19 MR. GATTO: Yes.

20 JUDGE TORCZON: What is the support for that?

21 MR. GATTO: The Vas-Cath case, the Vas-Cath.

22 JUDGE TORCZON: The Vas-Cath case says that we should
23 look at their specification, not your specification.

1 MR. GATTO: To the extent that claims are copied from an
2 application for provoking interference, interferences, yes, that is Vas-Cath.
3 Vas-Cath states that is what you should do if to the extent there is question
4 with respect to interpretation of the claim.

5 JUDGE TORCZON: How could we possibly get any
6 understanding of what the applicant needs from somebody else's
7 specification?

8 MR. GATTO: That is what Vas-Cath told us to do. I mean, to
9 the extent that --

10 JUDGE TORCZON: But let's examine that premise. I mean,
11 that premise makes no sense. Taken literally, what you are saying is that
12 the -- your inventor was using the other specification as the dictionary. I
13 mean, is that an admission you are making?

14 MR. GATTO: No. What I am saying is that --

15 JUDGE TORCZON: Well then how can we possibly rely on
16 the other specification to define what your invention is?

17 MR. GATTO: Well, I think whether you do it or not we get
18 pretty much the same result.

19 JUDGE TORCZON: Okay, well then let's not do it, because I
20 don't think that makes sense in light of any of the subsequent case law on
21 claim construction.

22 MR. GATTO: Okay, fair enough.

23 JUDGE MOORE: And we are not in an interference situation
24 at the moment.

1 MR. GATTO: Correct. Okay, so as far as just the overview of
2 the invention. I mean, what this invention primarily relates to, and I realize
3 some of the language, you know you talk about a first server and a second
4 server, and downloading coupons and redeeming coupons.

5 JUDGE MOORE: Okay, great. I am glad you said that,
6 because I am looking at claim 47 and I am sure you are intimately familiar
7 with it at this time.

8 MR. GATTO: Yes.

9 JUDGE MOORE: So we have a system for distributing and
10 redeeming electronic coupons.

11 MR. GATTO: Yes.

12 JUDGE MOORE: Now, what is a coupon? Is a coupon --

13 MR. GATTO: A coupon, and again referring to the applicant
14 specification, a coupon is what we think of as a discount coupon. It is a
15 incentive or some discount off of an item that you purchased.

16 JUDGE MOORE: But couldn't it also be like a request for
17 information, a coupon you send in to get more or further information about a
18 product?

19 MR. GATTO: In light of the specifications --

20 JUDGE MOORE: If you had ever paid a mortgage, couldn't
21 you have a coupon that is used as payment, you know to register your
22 payment and things like that?

23 MR. GATTO: And --

1 JUDGE MOORE: I am trying to figure out if you have
2 gathered the scope of this claim.

3 MR. GATTO: Yes. In light of the, again to Judge Torczon's
4 point, I mean, if you look at that term in light of the applicant specification,
5 it is clear they are talking about discount coupons. Things that you can
6 redeem for a product and get a discount off it as a way of manufacturers or
7 other coupon issuers to give you an incentive to buy their product to build
8 brand loyalty or various other reasons that discount coupons are used.

9 JUDGE MOORE: But does your specification actually limit
10 that term to a discount coupon?

11 MR. GATTO: Well it refers to product redemption coupons,
12 that is how it refers them. And the title of the application itself
13 is -- redemption coupons, and all throughout consistently the specification
14 uses the term coupon to refer to product redemption coupon, discount
15 coupons, etcetera.

16 JUDGE MOORE: Okay. Then you, going into the body of the
17 claim, you have a first server system, --

18 MR. GATTO: Yes.

19 JUDGE MOORE: -- including a computer processor and
20 associated memory.

21 MR. GATTO: Yes.

22 JUDGE MOORE: Not new there, right, that is standard?

23 MR. GATTO: Correct.

1 JUDGE MOORE: Said "first server system being connected by
2 a communications channel to a client system." Again, that is not new, you
3 are using something that has been known in the art. What is a client system?

4 MR. GATTO: A client system, again that is a term that I
5 believe is well understood in the art in the context of a client/server network,
6 which is what this claim relates to. A client system or client device would
7 be a device such as a PC, it could be a laptop, a desktop, various types of
8 computer devices that interact with the server to request information or other
9 interaction with the server.

10 JUDGE MOORE: So anything that has the characteristics of a
11 computer, a Smart Card for example?

12 MR. GATTO: I would say not a Smart Card. A Smart Card,
13 and I think that gets to one of the key issues here, a Smart Card itself is a
14 storage device. Now there may be some intelligence on a storage device if
15 it's a Smart Card, but the Smart Card itself doesn't request information from
16 the server.

17 The Smart Card is read by a reader. The reader may interact
18 with the server. The Smart Card is kind of like a thumb drive or you know
19 some type of storage device that you can connect, it may be a peripheral to a
20 client system. But in and of itself it is not a client system.

21 And I think this is one of the key issues that I wanted to get to
22 with respect to the examiner's rejection. Why does the examiner interpret
23 the Smart Card of the Nick Berger/Valencia combination if you will as a
24 client system? Why does he not refer to the card reader, which is more

1 analogous to the client system that is being claimed, it is the device that
2 interacts with the server?

3 The reason is the rejection simply doesn't work if you look at
4 the card reader, because the examiner, you know it appears he has kind of
5 formed a conclusion that the invention is obvious and then he is trying to
6 find support for it. And in interpreting Nick Berger to say that the storage
7 device is the client system, we believe is a very strained interpretation.

8 And even if it is a client system, even if you could adopt that
9 interpretation, which we submit would be improper and unsupported by the
10 common usage in the prior art, the rejection still fails, because the claim
11 further requires a second server system connected to "said communications
12 channel" for connecting with the client system, detecting the coupon and
13 redeeming it.

14 So even if the Smart Card is the client system, right, what is the
15 "said communications channel" that the second server is communicating
16 with that card with to detect the coupon?

17 JUDGE MOORE: Well, a question for you. I understand claim
18 47 says "said," but you have other claims that don't say "said," they say "a
19 communications channel" in that second communication occurring. So what
20 about -- I mean, your claim says "a communications channel" and "said
21 communications channel."

22 What makes it just this one link, or why can't it be something
23 along the lines of a storewide RF system or something like that? Why does

1 it have to be, why can't it be a series of readers strategically located
2 throughout the store?

3 MR. GATTO: It is potentially possible that if they were linked
4 in a way that met the claim elements that might satisfy, but there is nothing
5 in Nick Berger that suggests that. In Nick Berger, the consumer takes the
6 card, right, from the reader where they download coupons. They walk over,
7 they do shopping and they walk over to the checkout and it gets scanned at a
8 checkout.

9 There is no communication that is disclosed between those two
10 end points as far as reading the card. It is a different device that reads the
11 card in that case. And even then, it is the reader at the checkout that reads
12 the card. If the examiner you know, it is questionable that is even a server,
13 right?

14 That is more analogous to another client system that is actually
15 reading the card. And again, that is another I think problem with the
16 examiner alleging that a Smart Card is a client system here, because then
17 what is the server that is reading this?

18 It is not really a server, it is a card reader. A card reader is not a
19 server, again it is more analogous to a client device.

20 JUDGE TORCZON: Mr. Gatto, where does your specification
21 define a client system?

22 MR. GATTO: I believe that is not defined specifically there in
23 the specification, but it is clear in the context of how it is being used that it's
24 a PC. The example we give is a PC.

1 JUDGE TORCZON: So we should limit your claims to the
2 embodiments in the specification is your argument?

3 MR. GATTO: No. I am saying that the claim element should
4 be read consistent with the specification.

5 JUDGE TORCZON: Well, what is the difference between
6 reading it consistent with the specification and limiting it to the
7 embodiment?

8 MR. GATTO: The difference is that when you read a claim
9 consistent with the specification, looking at the specification as a whole and
10 looking at what is disclosed, the PC is disclosed. I believe it says there can
11 be other peripheral devices that you can use. That would be looking at the
12 specification as a whole to get an understanding of the scope of the meaning
13 of the term "client system."

14 JUDGE TORCZON: Well, if it means --

15 MR. GATTO: If you limit it to a PC --

16 JUDGE TORCZON: Counsel, if it means PC why does it not
17 say PC?

18 MR. GATTO: Again, because this is an example where this
19 claim was copied from the Lauer patent for purposes of provoking
20 interference.

21 JUDGE TORCZON: We are forgetting the Lauer patent,
22 because we don't have an interference, we have a rejection here. My
23 concern is this, the federal circuit has said it is a reversible error for us not to
24 read this claim as broadly as possible.

1 The way you get out of that is to define the term. You don't
2 define the term, we are stuck, we have to figure out what is as broadly as
3 reasonably possible. You have got to tell me why, where the dividing line is
4 between what the examiner wants to read and your expressed embodiments,
5 because the examiner says it is broader than your expressed embodiments.
6 You are saying it is broader than your expressed embodiments, but I don't
7 know where that line is.

8 MR. GATTO: Okay. Well, two things that I would say. First
9 of all, I respectfully disagree the test is that you can read it under any broad
10 interpretation. It --

11 JUDGE TORCZON: I didn't say that, as broadly as reasonable.

12 MR. GATTO: Exactly. And I think that is where the examiner
13 is falling down, is that there, it's not a reasonable interpretation to say that --

14 JUDGE TORCZON: How is it unreasonable?

15 MR. GATTO: Well, for two reasons. First, a card is not
16 generally perceived by one of ordinary skill in the art as a client system,
17 there is no evidence of that.

18 JUDGE TORCZON: Okay, you are testifying now. Where is
19 the evidence, either in the specification or in technical dictionaries or in
20 declarations? We can't accept attorney argument, that is not evidence.

21 MR. GATTO: Well first of all, I again respectfully submit it is
22 the examiner's burden to establish a prima facie case. It is the examiner that
23 is taking the position that a card is the client system, and it is the examiner
24 that --

1 JUDGE TORCZON: How is that unreasonable in light of the
2 language here? You chose a broader term than what your specification uses,
3 and the examiner is doing what you asked him to do.

4 MR. GATTO: I --

5 JUDGE TORCZON: He is construing it broader than the
6 embodiments you listed. You are asking us to narrow it to something that is
7 not your embodiments, but something less than what he is doing.

8 MR. GATTO: There's a couple of reasons, if I can articulate
9 the combination of reasons, I believe it becomes clear.

10 JUDGE TORCZON: Please do.

11 MR. GATTO: First of all, there is evidence of record, okay,
12 that the examiner has cited a dictionary definition of client system, all right.
13 And in it, in that definition it says, "it is a device that requests information
14 from a server."

15 There is simply no evidence of record that the card itself
16 requests information from a server. The card is a storage device to which
17 information is stored and read. It is the card reader, if anything, that may
18 interact with the server. So there is evidence of record regarding the
19 definition of client system, and the examiner cited himself.

20 JUDGE TORCZON: So if you have got a card reader in
21 combination with a Smart Card you have got a client system.

22 MR. GATTO: Perhaps. But the problem with the rejection is if
23 the card reader is the client system then the rest of the claim elements don't
24 work. And that gets to my second point as far as the scope of client system.

1 The claim itself, if we focus on claim 47 for a second, the claim itself says
2 the client system is adapted, that the server is adapted to establish connection
3 with the client system, all right.

4 So, there has to be a connection with the client system. And the
5 client system is what is requesting information from the server. So there are
6 elements that, functional elements within the claim itself that tell you what
7 the client system has to do. The card doesn't make any requests, there is just
8 no evidence of that.

9 The examiner is taking that position. It is unsupported, and the
10 examiner has no evidence to say that a card that anyone of ordinary skill in
11 the art would consider a card to be a client system. And I agree, you know
12 there has to be evidence, but the evidence has to support the examiner's
13 position if he is taking something that would be an unconventional reading.

14 I think when you look at the claims as a whole, there is
15 evidence of what a client system is, the examiner has cited a definition, it has
16 to interact with the server. And that is the context in which this term is
17 being used in the claim.

18 It is clear the client interacts with the server to request
19 information to download coupons, then there has to be a second server --

20 JUDGE MOORE: Hang on a second, I --

21 MR. GATTO: Yeah.

22 JUDGE MOORE: Where is that in claim 47? Where is this
23 request you keep referring to?

1 MR. GATTO: Well if you look at -- the examiner cites
2 definition of client system, and I believe that the definition that is provided
3 says that the client system requests information from a server. So, it is in the
4 definition of client system.

5 JUDGE MOORE: Well okay, I am looking at -- the name of
6 the game, to borrow the phrase, is the claim. And I am looking at the claim
7 and I am not seeing what you are saying, in terms of it has to request
8 information first. All I am seeing is a server system being adapted for (read
9 "capable of") transmitting an electronic coupon to said client system.

10 We have got a card and a card reader of some form or another,
11 and it seems to be capable of doing that in the prior art. So, I am not sure
12 where you are headed with that. I mean, the claim itself doesn't seem to
13 have these limitations in it that you are arguing.

14 JUDGE TORCZON: Nor incidentally, does the examiner's
15 definition. The examiner's definition says "a computer in a network that
16 uses services as provided by a server. So why can't the client simply use
17 services?

18 MR. GATTO: He can, but there is no evidence that the card
19 itself does that. The card is a device to which information is stored and read.
20 The other thing I would submit though, is even if claim 47 doesn't explicitly
21 recite that, there is various other claims that do.

22 Claim 57 for example, says "the client requesting information
23 from said server." Claim 58 says the server receives a request for

1 information from the client. So many of the claims specifically recite that
2 feature.

3 JUDGE TORCZON: But if I swipe a Smart Card, why isn't that
4 the same thing as a requesting, why isn't it effective? Why isn't the card
5 itself the thing that triggers the request?

6 MR. GATTO: Because it doesn't. There is no evidence that it
7 does. The Smart Card --

8 JUDGE TORCZON: No, no, no. Forget this, just plain logic,
9 plain English and common sense here. I swipe the card and I get a response.
10 I mean, nothing happens before I swipe the card. The card gets swiped and
11 a response comes. This is getting metaphysical to me. What is the
12 difference between swiping the card and getting a response when there
13 wouldn't have been a response otherwise, and a request for a service?

14 MR. GATTO: Because when you swipe a card, all you are
15 doing is the reader is reading information from the card.

16 JUDGE TORCZON: And interpreting that as a request.

17 MR. GATTO: Respectfully, there is no evidence of that.

18 JUDGE TORCZON: Well there is no evidence to the contrary
19 either, and we are stuck with the broadest reasonable, why is that
20 unreasonable?

21 MR. GATTO: Because the way a card reader works, okay --

22 JUDGE TORCZON: No, no, no, no. I don't see card reader in
23 the claim. We swipe the card, we get a request, we get a response, why is
24 that not a request?

1 MR. GATTO: I don't see anything in the prior art or the
2 evidence of records, which shows that happens. If you swipe a card, the
3 reader will have information. The reader can then do something with it, but
4 it is the reader that is taking action not the card.

5 The reader is simply reading data off the card.

6 JUDGE TORCZON: So why doesn't the reader respond to the
7 request without the swiping?

8 MR. GATTO: Why doesn't the reader --

9 JUDGE TORCZON: Yeah, why don't I, you know I walk up
10 and it just gives me the coupon?

11 MR. GATTO: There is no indication that is what happens.

12 JUDGE TORCZON: Well, there is no request. So what
13 triggers the request, what is the request? The request is the swiping. If there
14 is no swipe there is no response.

15 MR. GATTO: But that would be -- to the extent you are saying
16 the card is making the request. The card is interacting with the client
17 system, not with the server. Again, you have to read the claim as a whole.

18 JUDGE TORCZON: Yeah, I am trying to read the claim, but
19 when I read the claim it says "client system." When I read the spec I see no
20 definition of the client system. And the examiner has put together a
21 rejection in which the Smart Card is triggering a response.

22 MR. GATTO: Okay. Even if that interpretation could be
23 adopted, there simply is no common communication channel that the card

1 communicates then with a subsequent server. So, the rejection still falls
2 apart.

3 JUDGE MOORE: Well, I have a question about that. Why is
4 a bunch of these card readers scattered throughout the store not the same
5 channel?

6 MR. GATTO: Because the claim requires more than that. The
7 claim requires, again, we look at different claims. But if you look at claim
8 47, okay, it doesn't just require a bunch of readers connected together, it says
9 "the second server," okay. So let's say you have, let's say it was again, I am
10 not sure that a card reader is a server.

11 But even if it could be considered a server, the second server
12 has to connect to "said communication channel." So what was the
13 "communication channel?" It was the channel between which, under the
14 examiner's interpretation, the card communicated with the first reader. That
15 is an internal bus where the card reader reads the card, okay.

16 When you put the card into the checkout scanner, right, there is
17 a separate internal bus. So even if on the back end those things were
18 connected, the relevant communications, the storing information to the card
19 and reading information from the card is not occurring over the same
20 channel.

21 So under your scenario, even if that happened it wouldn't meet
22 the claim elements.

23 JUDGE MOORE: Switching gears just a little bit, but isn't that
24 just a question of wiring?

1 MR. GATTO: No. It is a question of -- you know, you can
2 have devices that have multiple connections, okay. But if the claim specifies
3 that you have a communication channel over which a certain communication
4 is occurring, in this case the storing of coupons. And the claim further
5 specifically says that you have a second device operating over that same
6 channel, okay.

7 Then even if there is other wiring, that is irrelevant to the claim.
8 You have to look at what is actually claimed. You would be ignoring the
9 claim elements. And I think that is what the examiner is doing here. And it
10 is not you know, this is one these things you have to kind of think about it
11 and look at the claim as a whole and look at how the claim elements are
12 inter-related.

13 And read those claim elements consistently. And when you
14 read them consistently, the examiner's rejection based on Nick Berger can
15 not stand, even if you interpret the card reader or the card as a client system.

16 JUDGE MEDLEY: What is the communication channel?
17 What does your specification say it is?

18 MR. GATTO: Well, it says it can be the Internet or other
19 networks.

20 JUDGE MEDLEY: So it can be any of a bunch of wires
21 connected together, because the Internet is just a huge network, right?

22 MR. GATTO: Correct. And in this --

1 JUDGE MEDLEY: So a communication channel, it is not
2 really from point A to point B in a single wire. It can be considered any of a
3 number of connections inter-connected.

4 MR. GATTO: It could be, correct. But that still has to be the
5 same channel. For purposes of the claim, it still has to be the same channel.
6 Okay, so even if you interpret the Internet that broadly, which is probably a
7 fair reading all right, in the Nick Berger it is clear the communication
8 channels by which you store information and read it are not the same, they
9 are not part of the same network. The examiner ignores that part of the
10 claim.

11 JUDGE MOORE: Well actually, I think that the examiner
12 probably interprets it broader than you do. And the question is why is that
13 unreasonable? To have all of these things are networked together, you have
14 got a hub in the middle of the store, you have got a kiosk in the aisle, you
15 have got a checkout counter, you have got a redemption center who are all
16 hooked together.

17 They are not isolated. And I am communicating with the kiosk
18 by a card reader. I am coming over here and I am communicating by a card
19 reader over here. Why is that unreasonable to say that type of
20 communication is the same channel?

21 MR. GATTO: Because the relevant information flow in the
22 claim does not occur over those same channels. When you look at the --

23 JUDGE TORCZON: Wait, wait, wait, wait. I thought you told
24 us that it was fair to read communication channel as the network.

1 MR. GATTO: It -- in the context of the invention, okay, even if
2 the Internet is the invention. So if I have a home computer, okay, and I am
3 going out over my ISP, all right, there is some portion of the communication
4 channel that is common. There can be other branches to the Internet, I
5 agree. But you are connecting to a server, okay. So I am connecting
6 through, if you call from my PC to the server from which I am downloading
7 the coupons, okay, a communication channel.

8 And there may be another, like Amazon, where I am going to
9 actually redeem the coupon when I buy something, all right. It is still going
10 to come over at least a portion of the same communication channel, the
11 portion from me to my ISP and then whatever the routing is in between that,
12 that is one thing.

13 JUDGE TORCZON: But wait, wait, wait. That is glossing
14 over an important point, because the routing on the Internet changes. I
15 mean, the same information gets split up into packets that can go all over the
16 place.

17 MR. GATTO: Correct. But --

18 JUDGE TORCZON: So there is no -- I mean, either "same"
19 means rigidly the same, in which case we are not talking about the Internet
20 or it means basically very broadly, any route that gets you from point A to
21 point B is the same channel as long as the endpoints are the same.

22 MR. GATTO: But the important thing with respect to the
23 claim, okay, is that you have to, even if you can interpret it that way, you

1 have to look at what the claim says. Is that there is two relevant pieces of
2 data flow, okay. One is you are storing information to a card.

3 And the second is you are reading the information. You are
4 detecting the information and reading it for purposes of redeeming it, okay.
5 Those are the two relevant data flows. In Nick Berger, okay, those occur
6 over two distinct channels that are not disclosed as being connected together
7 or being the same channel.

8 JUDGE TORCZON: Well, but the Internet can lead to
9 completely distinct routes being used, in fact in the same communication.
10 The same train of information can be split over multiple paths.

11 MR. GATTO: But the difference though is that if the network,
12 all right, if the communication channel is the Internet, okay. If we consider
13 that a common mean, there may be different routings within that network,
14 okay. But that is a network. If I then have an internal -- if I have a PC in my
15 house that has you know a wireless connection to other PC's in my house
16 that is a different network, okay, if it is not connected to the Internet for
17 example. In this --

18 JUDGE TORCZON: Wait, wait, wait. Why is that? Why is
19 that?

20 MR. GATTO: Because you could have different networks --

21 JUDGE TORCZON: But this seems like a heads I win, tails I
22 lose construction. If it's on the Internet it means anything, but if it's in my
23 house it's got to be a single wire.

1 MR. GATTO: No, no. I am not saying that. What I am saying
2 is that if I have a separate network, okay. If you have a separate network, an
3 internal network not connected.

4 JUDGE TORCZON: Well that is exactly the point I just made
5 though. You are saying well, on the Internet the path doesn't matter, but if
6 it's anything other than the Internet the path does matter. Where is that in
7 the claim?

8 MR. GATTO: I am not saying that. I apologize if that is how
9 it's being interpreted. If you look for example at a store as having an in-store
10 network, okay, that could be a separate network. It can be connected to the
11 Internet or not. But the relevant thing here is what is the examiner relying
12 on for the communication channel?

13 It is two distinct things and there is no evidence that they are
14 connected together.

15 JUDGE TORCZON: But it's part of the same network.

16 MR. GATTO: But there is not communication over the same
17 channel, that's the distinction.

18 JUDGE TORCZON: But we know that is not important,
19 because we can construe the claim to cover the Internet. Again, this seems,
20 your definition seems to change on context. It is a definition of convenience
21 that I am not seeing support for either in the claim or in the specifications.

22 MR. GATTO: I believe that the claim itself specifically says
23 that the second server is connected to "said communication channel" --

24 JUDGE TORCZON: Does that cover the Internet?

1 MR. GATTO: In the context of Nick Berger, no.

2 JUDGE TORCZON: No, no, no. In the context of this claim,
3 does communication channel cover the Internet?

4 MR. GATTO: It would cover the portion -- the communication
5 occurs over the portion of the Internet that connects from the users computer
6 to the Internet server from which they are downloading the coupon
7 information.

8 JUDGE TORCZON: So it is that limited?

9 MR. GATTO: In the context of how it is used in the
10 specification, yes.

11 JUDGE TORCZON: Okay, but that is a variable path.

12 MR. GATTO: The path could vary. But the claim requires that
13 the second, the second server communicate over the same channel. The
14 point is the relevant information flow, the storing of information, the reading
15 of information in Nick Berger occurs over two different channels.

16 JUDGE TORCZON: I am trying to figure out though, how one
17 of ordinary skill in the art is going to read this claim and get that. I mean,
18 that seems like an artificial distinction to me. Either said communication has
19 a rigid meaning, or does it? And you know frankly, I don't care. I mean, I
20 have no stake in what the construction is.

21 I just don't get why said communication channel can mean any
22 path if we are talking about the Internet, but when we go to apply a prior art
23 that doesn't involve the Internet it requires a specific path.

1 MR. GATTO: That is not what I am saying. If you look at
2 what Nick Berger is doing, you have a card that connects to a reader. The
3 communication channel over which that data flows is between the reader and
4 the card. There is a communication path, it is internal to the card reader, all
5 right, when the card gets inserted in.

6 When you take that card out to go to redeem it, it's connecting
7 to a different internal reader, or a different reader and there is a different
8 internal communication path.

9 JUDGE TORCZON: Okay. But when I order something over
10 the Internet, my request goes out and it probably goes to some place in
11 McLean. And from there who knows where it goes. It goes to some place in
12 North Carolina and then the West Coast, and then bounces up to Oregon,
13 say.

14 And then on the way back it goes to Akron, and Pittsburgh, and
15 McLean and back. Is that the same communication channel?

16 MR. GATTO: You are going to be connecting from your
17 computer to an ISP, all right. That clearly, that portion of the channel is
18 going to be common whether you are going to an Internet coupon server or
19 Amazon. There may be additional routing, but --

20 JUDGE TORCZON: So as long as any portion of the path is
21 common it is the same?

22 MR. GATTO: It has to be the same -- so even if we interpret
23 the Internet broadly as it can re-configurable, there can be different paths,

1 okay, then the communication channel it's still a common channel. It is an
2 Internet channel, right. The path may be different --

3 JUDGE TORCZON: Okay, there is a channel on the card too,
4 right?

5 MR. GATTO: Correct.

6 JUDGE TORCZON: So when I swipe the card, at least a
7 portion of the channel between the part the interfaces with the reader and the
8 part that is the memory there's a common channel.

9 MR. GATTO: No, there's a channel between the card, just like
10 there is a channel between the PC and the Internet server, right. There is a
11 communication channel between the reader and the card. The card itself is
12 not a channel. The channel defines the --

13 JUDGE TORCZON: There is a channel on the card though.

14 JUDGE MOORE: There has to be something connecting the
15 internal memory going through --

16 MR. GATTO: If it is magnetic, no, you could have a magnetic
17 reader, it doesn't have to be.

18 JUDGE MOORE: But that would be part of the channel
19 though, wouldn't it?

20 MR. GATTO: Well, no. The magnetic information is the
21 stored information, the way you read it.

22 JUDGE TORCZON: But we don't have any limitation that it
23 has to be a magnetic card like a credit card.

1 MR. GATTO: No, I am saying, but it is not inherent that there
2 is a communication channel on the card itself, all right. I gave you an
3 example of where there is no communication channel. I am not saying it has
4 to be limited to that, but it is not inherent that the card has a channel, there is
5 no evidence of that.

6 The claim talks about establishing a communication connection
7 between a server and a client.

8 JUDGE MOORE: But you want us to read that
9 communications channel as going no further than that. It has to stop at the
10 client and it has to stop at the server, it can not go anywhere else. Is that
11 what you are asking us to read that claim as?

12 MR. GATTO: What I am saying is that what the claim says,
13 that there is a system for connecting. The communication channel connects
14 a client system and a server.

15 JUDGE MOORE: Yeah, but reasonably, broadly, I can take
16 that a lot of other places too. You are part of a channel, you are part of a
17 bigger network. You are part of the storewide network. You are also part of
18 the Internet. You are making us, trying to make us read a limitation that I
19 am just not seeing and I don't think my colleagues are seeing it either.

20 So you need to point to us where it says it can not be anywhere
21 else you know, why it has got to be one or the other, it is rigidly defined or it
22 isn't.

23 MR. GATTO: Well, if you are saying that the communication
24 channel that connects A and B, okay, what you are saying is the

1 communication channel is B or part of B, right. When you say there is
2 something between something, you are referring to you have two endpoints
3 and something between it. The communication channel is defining what is
4 between the client system and the server.

5 JUDGE TORCZON: Yes, but we know from the Internet
6 example that it could be any path.

7 MR. GATTO: That's right, but it still has to be a path between
8 the two end devices.

9 JUDGE TORCZON: Right.

10 MR. GATTO: You are saying the card itself is the
11 communication channel. Now you are saying that the card is the client
12 system and the communication channel.

13 JUDGE MOORE: No. We are just saying you haven't
14 established that is an unreasonable interpretation.

15 MR. GATTO: Well first of all, the examiner hasn't taken that
16 position and second of all, there is no evidence that the card is a
17 communication channel. The card is read by something. If to the extent it
18 being read, there is some connection, whether it is magnetic, electric or
19 otherwise, okay. There is a connection being established. Whatever that
20 connection is, whatever that path is over which data is read from the card to
21 the card reader, that is the communication channel consistent with the
22 interpretation of the claim.

23 It is the communication path between the two devices we are
24 talking about.

1 JUDGE MOORE: I want to switch gears just for a second.

2 MR. GATTO: Okay.

3 JUDGE MOORE: I am having difficulty with claims 57 and
4 58. Can you explain to me why, how 58 works with claim 57, in terms of
5 how can the server receive a request for information from the client before it
6 is, before the establishment of a connection?

7 MR. GATTO: It is before the server establishes a connection.
8 Simply put, what this really means is the client is initiating a transaction.
9 The client initiates a request for information and then the server will connect
10 to the client to transmit information, that is all it really means.

11 JUDGE MOORE: So how does the server receive the request
12 for information?

13 MR. GATTO: The client initiates a transaction. The client
14 initiates a connection to the server, request information, right. Again, the
15 Internet is a stateless communication. So you request information, the server
16 will process information, and then the server will then initiate a
17 communication to the client.

18 All this is saying -- I mean, you can have push systems like Von
19 Kohorn, which is a broadcast system where you send stuff out to clients and
20 then they can use it if they want or you can have a pull system, which is
21 what the invention relates to, where the client can go to an Internet web site
22 and pull down information whenever they want.

23 So the client initiates a request to the server. And then, in
24 response to that, the server will process it and do what it needs to do. And

1 the it will establish a connection with the client and transmit information to
2 the client. That is all the claim relates to. It is not clear why the examiner
3 issued a 112. And that is what the specification discloses.

4 JUDGE MOORE: I think the issue arises from communications
5 channel, that term, the definition of it is vexing.

6 MR. GATTO: It is establishing a connection over a
7 communication channel. So when you establish a connection, the server
8 right, you can have a push server that says okay, I am going to communicate
9 with this client, okay. And there are some systems that are like that for
10 different purposes. You will have a server side, communication-initiated.

11 In other situations when you are doing web browsing or going
12 to surf for Internet coupons for example, the client contacts the server first.
13 So the client requests information, okay, and again, because it is a stateless
14 communication essentially, the server will do what it needs to do. It knows
15 what the return address is and then it will initiate a communication or
16 establish a connection over the path to the client.

17 There is not a permanent connection between a client and a web
18 site. That is all that this claim is trying to get to. So again, in simple terms I
19 would say think of it as a pull system versus a push system.

20 JUDGE MOORE: Okay, I know I derailed you. If you
21 would --

22 MR. GATTO: I really, I know we have probably gone over it, I
23 appreciate the time but one quick thing on Von Kohorn. What I would like
24 to just say is that you know with respect to Von Kohorn, I think there is a lot

1 of differences between what Von Kohorn discloses and what the invention
2 claims.

3 One of the key things though is -- I mean, the examiner, well I
4 believe he is incorrect in a number of -- one thing he is correct about, Von
5 Kohorn is very clear with respect to how coupons are redeemed in his
6 system. It is by mail or you walk into the store, or you can call over the
7 telephone and give the code.

8 What the examiner then does is he relies on -- Von Kohorn is
9 116 columns of information regarding a wide variety of different
10 embodiments. If you look at where the examiner cites to, he cites to you
11 know different lines from different embodiments that relate to different
12 systems that some of which don't even relate to discount coupon.

13 There is wagering systems, you have lottery systems, there is
14 different things that are in there. And the examiner takes a random walk
15 through the reference and finds you know snippets that seemingly support
16 the position that he wants to take.

17 The bottom line, it's very clear from Von Kohorn --

18 JUDGE TORCZON: Okay, why is that unreasonable though?
19 I mean, it is all in the prior art. Why is looking at different parts of a
20 reference --

21 MR. GATTO: Because if they are different embodiments, you
22 can't pick and choose --

23 JUDGE TORCZON: Well, but an obviousness over two
24 references, I am combining things from two completely different references.

1 So why is it necessarily unreasonable to look at teachings of different
2 embodiments in the same reference?

3 MR. GATTO: It is not necessarily unreasonable. What the
4 examiner does here is unreasonable, because when you look for example, at
5 a wagering system, which is one of the embodiments he refers to, there is no
6 coupon used for a discount transaction to the extent that you have some
7 evidence of what you wagered. That is the evidence of the transaction itself.
8 You are not using a coupon in the context of the invention.

9 JUDGE TORCZON: But does a communication with a
10 customer, does an interaction with a customer electronically?

11 MR. GATTO: Correct. But I think that is true but irrelevant.

12 JUDGE TORCZON: So why isn't that relevant?

13 MR. GATTO: I will tell you why, because the claim itself
14 requires that, with respect to the redemption side. So once you have stored a
15 coupon, let's assume that Von Kohorn has a coupon stored somewhere on
16 the what's analogous to a client device. Then what the claim talks about is
17 detecting that coupon and redeeming it okay. The electronic communication
18 that the examiner refers to is to determine whether you have a winning
19 ticket, okay.

20 The electronic communication that the examiner refers to is to
21 determine whether you have a winning ticket, okay. That is not a
22 redemption, that is just a determination if it's a winning ticket.

23 JUDGE TORCZON: Okay, so what you have said is the
24 wagering example doesn't anticipate the claim, and I will concede that. But

1 why does that make it not relevant? Why isn't it not addressing at least part
2 of the problem that faces the art?

3 MR. GATTO: To the extent that -- well it depends how you
4 define the problem of course, right. If the problem is can you communicate
5 over an electronic network? Sure, yeah you can. We are not claiming, but
6 we are claiming --

7 JUDGE TORCZON: So if the examiner is using it for that
8 purpose, to address that it was known in the art how to do that slice of the
9 problem it would be relevant, right?

10 MR. GATTO: We will concede that communicating over a
11 network --

12 JUDGE TORCZON: But that doesn't answer my question. If
13 the slice that the examiner cites is relevant to the problem being solved, then
14 it is relevant, right?

15 MR. GATTO: That is not the problem being solved. The
16 invention doesn't say "hey, we are telling you how to communicate over a
17 network." What we are saying is --

18 JUDGE TORCZON: But the invention does do that stuff.

19 MR. GATTO: It uses that as a tool, but that is not the problem
20 it is solving, I think that is the difference. The problem is --

21 JUDGE TORCZON: But the art knew how to solve that slice
22 of the problem, right?

23 MR. GATTO: I don't think that is the problem. We are not
24 saying --

1 JUDGE TORCZON: So you are conceding that the -- so you
2 are telling us then that we don't have to rely on the reference at all for that,
3 because we concede that much is in the prior art?

4 MR. GATTO: No. What I am saying is that is not a proper
5 articulation of the problem. The problem the invention addressed was how
6 to enable consumers to remotely obtain and electronically remotely redeem
7 coupons, okay.

8 JUDGE TORCZON: But the standard for obviousness has
9 never been a two-referenced anticipation. Necessarily, there are going to be
10 obviousness rejections where the examiner has got the point to analogous
11 art --

12 MR. GATTO: Correct.

13 JUDGE TORCZON: -- to show solutions to at least part of a
14 multi-part claim. We have got a multi-part claim, right?

15 MR. GATTO: Yes, but even if all that is true, the piece that
16 would be relevant is if you -- the claim talks about on the back end there,
17 reading over an electronic you know, from a server to a client, reading the
18 stored coupon information and then electronically redeeming it at that
19 server.

20 The wagering system has nothing to do with reading the
21 information and redeeming it. It doesn't go to redeeming. It is not
22 analogous for that purpose. It was a separate reference. You could say it is
23 not an analogous art. If you look at a wagering system --

1 JUDGE TORCZON: No, we can't, no, we can't. It is not that
2 simple. You are saying because it is not dealing with redeeming coupons we
3 can't look at it at all, and that has never been the test for analogousness.

4 MR. GATTO: The test for analogous art is what is the field of
5 the endeavor, right. And the field of endeavor here is clearly, you know how
6 to obtain and redeem coupons. So I submit that is the field --

7 JUDGE TORCZON: But wait, wait, that is one possibility,
8 what's the second?

9 MR. GATTO: That is first, and the second part is the
10 problems -- even if it is not from the same field, was it the same or similar
11 problems that the examiner addressed or that the applicant addressed.

12 JUDGE TORCZON: Okay. And that can be sub-elements of
13 the claim, right?

14 MR. GATTO: Yes. And to the extent that the sub-elements are
15 what we are talking about, is detecting a coupon on a client system and then
16 redeeming that coupon. The wagering system has nothing to do with
17 redeeming even the bet, right.

18 JUDGE TORCZON: But is that the way the examiner was
19 using it?

20 MR. GATTO: Yeah, yeah. He was saying that you, because
21 you have a wagering system and you can communicate information
22 electronically. All you are doing is communication information
23 electronically, you are not doing the functions that are claimed, it doesn't
24 relate to the functions that are being claimed. When you --

1 JUDGE TORCZON: But you just said that the way he was
2 using it was to address electronic communication with an end user.

3 MR. GATTO: Correct. And I am saying that is not what the
4 claim -- the claim, it's not that broad though, right. You have to look at the
5 particular --

6 JUDGE TORCZON: The claim doesn't involve, the claim
7 doesn't involve electronic communication with an end user?

8 MR. GATTO: The test is not what it involves, the test is what
9 are the problems the examiner, the applicant was trying to solve. And it's,
10 you have now downloaded a coupon right --

11 JUDGE TORCZON: So you are telling me that the claim
12 doesn't cover solving the problem of electronically communicating with the
13 consumer.

14 MR. GATTO: Electronic communication per se is not the
15 problem. It's functional problem of you have a coupon, how does the
16 consumer redeem it.

17 JUDGE TORCZON: Are you familiar with In re Gorman? It is
18 a Judge Newman decision from the early 90s.

19 MR. GATTO: The name sounds familiar, but I --

20 JUDGE TORCZON: Okay, I strung together 16 different
21 references I believe, it is a large number.

22 MR. GATTO: Yeah.

23 JUDGE TORCZON: Each was addressing a different sub-part
24 of the problem. Now, not a single one of them collectively addressed the

1 entire claim. They were all addressing sub-problems with the -- now, how is
2 it that, I mean, are you telling us the case law was wrong?

3 MR. GATTO: No. What I am saying is that even if, even if
4 you assume that the problem that you are saying is a sub-problem, let's
5 assume it is for a second, okay, you know of communicating information
6 over a network. So what? The questions is where in any of the references
7 the examiner is relying on, okay, is there an indication that the
8 communication can be used for purposes of reading a coupon that is stored
9 on a client device and then redeeming it.

10 Von Kohorn tells you that he, and the examiner cites this
11 qualification, the examiner says "in Von Kohorn you redeem coupons by
12 mail or in-person, or by calling up over the phone and giving the
13 information." That is it. Even if you know communicating information
14 generally over a network was known, how does that suggest without
15 hindsight that you should now change Von Kohorn into a system where you
16 are using that communication path to read a coupon from a client system and
17 then redeem it. It doesn't tell you that, right.

18 So what I am saying is the tool is there. And while the system
19 perhaps could be used, that is not the test. Is there a suggestion to perform
20 the functions claimed? And that is what is missing from Von Kohorn.
21 There is no electronic redemption.

22 JUDGE MOORE: You raise a good point. Undoubtedly, you
23 wrote this brief before the decision in KSR came down.

24 MR. GATTO: Right.

1 JUDGE MOORE: And KSR tells us that we "must ask whether
2 the improvement is more than the predictable use of prior art elements
3 according to their established function." What more do we have other than
4 prior art elements which are being used in the manner for which they are
5 known?

6 MR. GATTO: You have the missing function. KSR deals with
7 a combination of known elements. There is no evidence that the functions or
8 steps, depending whether it is the method or system claims, that the
9 functions or steps of reading stored coupon information from a client and
10 then using that in connection with a transaction to provide a discount that
11 those steps were known.

12 If they were known in a different context, if the examiner points
13 at something in a different context that related to that, then maybe KSR is
14 more relevant. But in this case, there is no evidence of that. And that is one,
15 that is one of the main failings of the Von Kohorn reference, is it tells you
16 how to redeem it.

17 And there is nothing that the examiner relies on, even if it
18 addresses maybe other aspects of the problem, there is nothing that tells you
19 redeem in a different way. The things he points to do not deal with
20 redeeming coupons that are stored on a client system.

21 JUDGE MOORE: Well, even if we accept that premise for
22 Von Kohorn, what about Nichtberger? Nichtberger pretty much laid it out.

1 MR. GATTO: Well, again in Nichtberger -- again, the
2 examiner doesn't combine Nichtberger with Von Kohorn. If you look there
3 is two different rejections, Nichtberger, Valencia on a Kohorn and --

4 But even if you look at Nichtberger, again, Nichtberger doesn't,
5 we get back to the same arguments, I won't rehash them. But Nick Berger,
6 again it is an in-person communication. You take the card and you walk to
7 the checkout. It is an in-store redemption. It is not a remote electronic
8 redemption, which is what the claims go to.

9 JUDGE TORCZON: So all we have done is automated that
10 step, why is that unpredictable?

11 MR. GATTO: It is not just automating it, because it requires
12 that you know, again, if you look at what the claim specifically requires
13 there is a series of steps or functions that involve reading the information off
14 the stored coupon, off the client system and doing the redemption.

15 There is no suggestion to do that. There is nothing the
16 examiner points to suggest to do that remotely. Nick Berger is in-store.

17 JUDGE MEDLEY: But isn't it just like he said, automating a
18 known process? I mean, redeeming coupons, been doing that for years and
19 years. And under, for example Leap Frog, aren't you just using now known
20 technology to --

21 MR. GATTO: No.

22 JUDGE MEDLEY: -- automate these steps?

23 MR. GATTO: I respectfully disagree. We are not doing that,
24 because what you are enabling is automatic discounts to be applied to online

1 transactions for example. That was not known. With an online transaction
2 in the prior art, if you had an electronic coupon, how do you apply that
3 coupon? You couldn't, right, because you are ordering online, you have a
4 physical coupon, the two don't work.

5 It is a series of steps and functions. If you look at the claim as a
6 whole, it is a series of steps and functions that enables that. But it is not
7 merely automating the delivery, the redemption of a coupon.

8 JUDGE MOORE: But wouldn't that argument be more
9 persuasive if any of these claims were limited to an online transaction
10 utilizing the Internet?

11 MR. GATTO: A number of the claims do refer specifically to
12 redeeming the coupon in connection with a transaction.

13 JUDGE MOORE: But we have been discussing the
14 independent claims, the supporting claims.

15 MR. GATTO: Well, I believe some of the independent -- well
16 first of all, claim 63 refers to the Internet --

17 JUDGE MOORE: But those limitations aren't in claim 57, they
18 are not in claim 47. Well I do think we understand your position. And I
19 don't want you to think that we, because we are being vigorously
20 questioning, that we have pre-judged this or made up our minds. We are just
21 very interested in this one.

22 MR. GATTO: I do appreciate your vigorous questioning, it
23 was a good exercise. One last thing if I can. You know, the other thing we
24 didn't talk about is claim 60 for example. There is also other servers for, and

1 again, automatically authenticating the coupon before to redeem. Again,
2 there is just simply nothing in the prior art reference the examiner points to
3 in the combination of electronic redemption of coupons to do that as well.

4 So what I would say in closing, because I realize we have gone
5 a long time and I appreciate the extra time you have provided, is that there is
6 a variety of scope of claims here. And I gather from your questioning, some
7 of the claims you wish were more specific.

8 Some of the claims do specifically talk about the Internet, some
9 specifically talk about you know, doing this in connection with an online
10 transaction. Others talk about authenticating. We have separately argued a
11 lot of these claims. We would not like to see these stand or fall together, that
12 we believe that there are separate elements in some of these claims but there
13 is common themes throughout some of them.

14 Where if you agree with us, we believe all the claims are
15 allowable. But if not, we believe at least some of these claims are clearly
16 allowable over the prior art and the rejection provided by the examiner.
17 Thank you very much.

18 JUDGE TORCZON: I would like to make just one observation,
19 and that is in the context of interferences, since that is how this comes up.

20 MR. GATTO: Yes.

21 JUDGE TORCZON: One of the things that the rules put in
22 place in 2004 point out, is that written description and copied claim is a
23 problem. And there is just no need to copy a claim. And I think this case,

1 however it turns out, shows the difficulty when you are trying to cross-apply
2 somebody else's language to your specifications.

3 So one take home lesson would be that you can save yourself a
4 lot of trouble by framing things in terms of your specification and not
5 somebody else's.

6 MR. GATTO: Thank you. One last thing, for real the last
7 thing. I just wanted, if you are interested, there has been subsequent history
8 in some of the cases. We had through the briefing schedule, had provided
9 updates on the status of related applications and appeals.

10 There have been additional subsequent decisions.

11 JUDGE MOORE: Any favorable to you?

12 MR. GATTO: On most -- fortunately, many of these don't
13 relate to the same claim elements we are dealing with here, but many of
14 them were not favorable.

15 JUDGE MOORE: I appreciate you bringing them to our
16 attention. We have already looked into them. Every one you listed in your
17 brief we have checked into.

18 MR. GATTO: Okay. So I didn't know procedurally if there is
19 a mechanism for submitting something or whether we need to under rule 56.
20 But if you are telling me I don't need to submit anything, I won't.

21 JUDGE MOORE: Not at this point, you don't need to do that.
22 We already know what the status of those cases are.

23 MR. GATTO: Thank you very much. I appreciate all the time.

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1 (Whereupon, at approximately 9:45 a.m., the proceedings were
2 concluded.)